83-49

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ROBERT A. FRANK,

PETITIONER

V.

GORDON J. LAVIS, Individually and as Commissioner of Parks and Recreation; ANTHONY CANCELLIERI, Individually and as Director of Personnel, Department of Parks and Recreation; GLENN ANDERSON, Individually and as Administrative Parks and Recreation Manager of Staten Island,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT A. FRANK
Petitioner, Pro Se
402 Guyon Avenue
Staten Island, N.Y. 10306
Telephone (212) 351-2369

I.

QUESTION PRESENTED

1. Whether the Plaintiff actually worked at least 13 days more than the 249 days required to complete his 52 week probationary period on June 5, 1981?

2. Whether Civil Service Rules and Regulations as amended to January 10, 1980 Part 4 - Appointment and Promotions # 4.5 Probation (4) (iii) applies to Plaintiff? (Supra states "A probationer whose services are to be terminated for unsatisfactory service shall receive written notice at least one week prior to such termination.")

3. Whether the Circuit Court erred in stating that written notice was required before the expiration of the probationary period instead of written notice given prior to Plaintiff's termination date of June 5, 1981?

4. Whether the Plaintiff was denied

his day in court since he specifically asked for a Trial by Jury in his Complaint?

5. Isn't a fact that according to New York City Personnel Policy and Procedure No. 615-77a (cited in Order 82-7444 U.S. Court of Appeals for the Second Circuit) paragraph A-3 states than an appointing officer cannot terminate the services of a probationer during the probationary period unless he gives written notice both to the N.Y.C. Personnel Director and the Probationer?

6. Isn't a fact that since Petitioner was ordered to keep the same assignment for several months after being demoted that according to the Waterman v. Miller 69 Misc 2d 217 decision Petitioner was still considered employed in the higher title of Associate Park Service Worker?

III.

7. Isn't it true that according to Polenski v. Montgomery 71 N.Y.S. 2d 386 that where there are conflicting allegations as to the good faith of the appointing officer in discharging a civil service employee prior to being tenured an issue of fact is raised requiring a Jury Trial?

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ROBERT A. FRANK,

PETITIONER

V.

GORDON J. DAVIS, Individually and as Commissioner of Parks and Recreation; ANTHONY CANCELLIERI, Individually and as Director of Personnel, Department of Parks and Recreation; GLENN ANDERSON, Individually and as Administrative Parks and Recreation Manager of Staten Island,

RESPONDENTS

- - - - - - - - - - - - -

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

- - - - - - - - - - - - -

The Petitioner, Robert A. Frank, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on 28 January 1983.

OPINION BELOW

The Court of Appeals entered its ORDER affirming the Summary Judgment in favor of

the Respondents on 28 January 1983. A copy of the ORDER is attached as Appendix A.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment V:

> No person shall... be deprived of life, liberty, or property, without due process of law;....

UNITED STATES CONSTITUTION, Amendment VII:

> Trial by Jury is guaranteed under the Amendment of the United States Constitution .... in accordance with F.R.C.P. 38 shall be preserved to the parties inviolate.

Constitutional Law # 318 (2):

> Summary dismissal of tenured employee is violation of Fourteenth Amendment's guarantee of proceedural due process.

STATEMENT OF THE CASE

Plaintiff is a permanent Civil Service City of New York employee promoted to Associate Park Service Worker on June 7, 1980. He was required to serve a 52 week probationary period. Plaintiff states that according to Albano v. Kirby 36 NY 2d 526 and the Rules and Regulation of the Department

of Civil Service as amended to January 10, 1980 in # 4.5 (4) (iii) that notice must be given to the probationer prior to his termination, the latter Rules and Regulations state "A probationer whose services are to be terminated for unsatisfactory service shall receive written notice at least one week prior to such termination. On June 6, 1981 Plaintiff who was compelled to work 386 hours more than the required number of hours to complete his probationary period believed he became a permanent tenured employee in the title of Associate Park Service Worker. On June 11, 1981 after signing in and working as an Associate Park Service Worker with the approval of Plaintiff's supervisor Plaintiff returned home and was notified in an undated letter Postmarked on June 9, 1981 that Plaintiff was being demoted to Park Service Worker effective June 6, 1981. It was signed by Anthony Cancellieri a subordinate of Appointing

Officer Davis.[1]

On June 20, 1981 Plaintiff wrote Appointing Officer Davis a letter requesting re-instatement to the title of Associate Park Service Worker.

On June 29, 1981 Plaintiff filed his complaint with the Eastern District Court of N.Y. wherefore Plaintiff's demands were:

1. Money damages in the amount of $100,000, plus costs.

2. Injunction against the defendants requiring them to restore Plaintiff back to the title of Associate Park Service Worker.

3. Plaintiff requests a Trial by Jury.

4. Plaintiff also requests an Examination before Trial naming six individuals.

On January 14, 1982 Justice Henry Bramwell signed an order directing the Defendants to

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1. Probationer shall be notified in writing that his services are to be terminated by the appointing officer; such function was not to be delegated to anyone; therefore adjudging that at the end of such period petitioner's employment became permanent. Schneider v. Lynde et. al. 12 AD 2d 812.

answer the following two questions:

> 1. What is the number of actual days plaintiff was required to work for the 52 week period between June 7, 1980 and June 5, 1981 to complete his probationary period?
>
> 2. What is the actual days that plaintiff worked in the 52 week period between June 7, 1980 and June 5, 1981?

The Defendants' answer to Question one was evasive. (Exhibit D.)

On March 10, 1982 Plaintiff served the Defendants an order Compelling Discovery for the reason that the answer is evasive. The Defendants were to appear before the Court on March 19, 1982. On March 16, 1982 Plaintiff served the Defendants with a 50 Question Interrogatories returnable on March 26, 1982. Through manipulation the Defendants were successful in not having the Court decide the March 10, and March 16, 1982 Plaintiff's motion.

On April 16, 1982 the Honorable Justice Bramwell decided for Summary Judgment in Favor of the Defendants. Judge Bramwell

erroneously quoted Section 63(2) of the New York Civil Service Law in arriving at his decision since Section 63 (2) only applies to Exempt Employees. (Plaintiff is a Competitive Class Employee with all its Rights. See Plaintiff's Reply Brief Page 5 Exhibit C.)

Judge Bramwell refers to Personnel Policy and Procedure # 615-77a Points A.4 and A.5 in arriving at his decision yet ignores # 615.77a Point A.3 which states that an appointing officer cannot terminate the services of a Probationer before the end of a probationary period unless he (she) gives written notice both to the N.Y.C. Personnel Director and the Probationer. (Plaintiff alleges it was never the intent of the Defendants at the time of Notice on June 11, 1981 to extend the Probationary Period to June 19, 1981 since Plaintiff's notice was a demotion retroactive to June 5, 1981.)

Judge Bramwell in his decision commented on the New York State Civil Service Rules and Regulations and stated "However, as #1.1 of those Rules reveals they are not applicable to City Employees." [2]

On January 28, 1982 the United States Court of Appeals for the Second Circuit affirmed the District Court's judgment stating that only written notice of termination before the expiration of the probationary period is required. The Court completely ignored the facts that Albano v. Kirby and the Rules and Regulations of the Department of Civil Service Supra as amended to January 10, 1980 require

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2. Judge Bramwell had to be in error since Rules and Regulations of the Department of Civil Service, CHAPTER 1 - Rules for Classified Service in direct quotes:

" # 1.1. Application of Rules

1. Generally

New York City civil service rules and regulations mandate adherence, wherever possible, to provisions of the New York State civil service system. Mangiaracinn v. Beame 1976. 54 AD 2d 418, 389 N.Y.S. 2d 90."

that notice must be given prior to termination The Court also ignored # 615.77a Point A.3, Schneider v. Lynde, Supra; the Waterman v. Miller and the Polenski decision. (Supra Question 5 & 6 of Questions Presented for Review.) The Court also placed the following footnote - N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly availeble to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or anyother court.

REASONS FOR GRANTING THE WRIT

1. The Petitioner who asked for a Trial by Jury in his Complaint was never given his day in Court and therefore has had his Property Rights taken away from him without due process of law.

The Petitioner had worked more hours and days than any other of the two hundred Park employees employed in the Borough of Staten Island, during Petitioner's 52 week Probationary

Period in the title of Associate Park Service Worker between June 7, 1980 and June 5, 1981. He became a tenured employee on June 6, 1981. Petitioner received notice of his demotion in an undated letter Postmarked June 9, 1981 and received by Plaintiff on June 11, 1981 by a subordinate of the Appointing Officer that was effective retroactive to June 6, 1981.[3] Petitioner did not receive the higher pay Petitioner was entitled to for working in the higher title of Associate Park Service Worker that he worked for the week ending June 11, 1981. Petitioner was also required to continue doing the same duties he performed in the Associate Park Service Worker Title

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3. Albano v. Kirby 36 NY 2d 526 and the Rules and Regulations of the Department of Civil Service as amended to January 10, 1980 state that written notice must be given prior to termination.

after being demoted to Park Service Worker until September 1981.[4] The preponderance of evidence was in favor of the Petitioner, yet Petitioner was denied his Right of Trial by Jury as declared in the Seventh Amendment to the United States Constitution.

2. The District Court was in error to permit Summary Judgment against the Petitioner before acting on Plaintiff's motion that Defendants' response to Interrogatory Question 1 was deliberately evasive.

Interrogatory " 1 "

What is the number of actual days Plaintiff was required to work for the 52 week period between June 7, 1980

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4. Waterman v. Miller 69 Misc 2d 217 states that since Waterman's duties were kept the same after he received his notice he was considered still working in that title. The Court stated that Waterman's employer was required to give Waterman a different assignment. The logic behind a different assignment is to avoid extending the probationary term in the original position.

and June 5, 1981 to complete his probationary term?

Response to Interrogatory " 1 "

Plaintiff was required to work one full calendar year to complete his probationary term - that is, from June 7, 1980 to June 7, 1981, that date being automatically extended by the number of days of Plaintiff's absence without pay and the number of days when plaintiff was on limited duty status, annual leave, sick leave, and using compensatory time.[5]

3. The District Court was in error in allowing Mr. John F. Kearney's sworn affidavit to be used by the Defendants to obtain Summary Judgment.

Mr. Kearney came to Staten Island seven months after Petitioner's demotion. The Petitioner was entitled to have his 50

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5. Appendix D - Defendants' Response to Plaintiff's first set of Interrogatories.

Questions Interrogatories answered by Mr. Kearney which would have disproved both Mr. Kearney's knowledge and facts pertaining to Petitioner's Demotion. [6]

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

Robert A. Frank

ROBERT A. FRANK
Petitioner, Pro Se
402 Guyon Avenue
Staten Island, N.Y. 10306
Telephone (212) 351-2369

DATED: 31 March 1983

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6. Appendix E - Notice of Motion for Interrogatories under Federal Rules of Civil Procedure 26 to 37 and Freedom of Information Act.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

ROBERT A. FRANK,

Plaintiff,

81-CV-2097

-against-

GORDON DAVIS, ET AL.

Defendants.

----------x

United States Courthouse
Brooklyn, New York

April 16, 1982
10:00 A.M.

B E F O R E :

THE HONORABLE HENRY BRAMWELL, U.S.D.J.

HENRY SHAPIRO
Official Court Reporter

EXHIBIT A

A P P E A R A N C E S :

ROBERT A. FRANK
The Plaintiff - Pro Se

CARYN HIRSHLEIFER, Esq.
Assistant Corporation Counsel

.ooo.

THE COURT: Yes, I will hear you.

MR. FRANK: Your Honor, on March 5, 1982, you read into the record that the defendant admitted that the plaintiff was terminated on June 5,1981 --

THE COURT: You are reading into the record now?

MR. FRANK: Yes.

THE COURT: Go ahead.

MR. FRANK: According to the Rules and Regulations of the Department of Civil Service, as amended on January 10, 1980, which specifically state that New York City Civil Service Rules and Regulations mandate adherence to the January 10, 1980, rules.

Those Rules and Regulations declare, under Number 4.5, Number 4, and Number 3 small italicized, that a probationer whose services are to be terminated for unsatisfactory service, shall receive written notice

at least one week prior to such termination.

Therefore, in plaintiff's instant case, it was necessary to notify plaintiff on or about May 29, 1981, to prevent plaintiff from becoming a tenured employee.

Since the defendants' admit that the plaintiff first received notice on June 11, 1981, it is obvious logic that, since the defendants violated that rule, the plaintiff became a tenured employee on June 6, 1981.

Also, your Honor, according to Schneider v Lindy, 12 AD 2d 812, an appointing officer cannot delegate his authority to terminate a probationer.

He must follow the prescribed rules.

In Mr. Schneider's case, he was re-instated because the appointing officer did not follow the prescribed rules.

In plaintiff's instant case, the defendant received an undated letter, postmarked June 8, 1981, and received by plaintiff on July 11, 1981, demoting plaintiff illegally, retroactive to June 6, 1980 signed by a subordinate of an appointing officer, Anthony Canselero.

In Waterman v Miller, 69 Misc. 217, the Court stated that, upon termination, the probationer must be given a different assignment, otherwise he would be considered working in the same title prior to termination.

In plaintiff's instant case, he was informed by his superior of that fact, yet they still ordered him to work as a cashier up to September 10, 1981.

The cashier's position was his original assignment when he assumed the higher title of Associate Park Service Worker.

Mr. Waterman was reinstated with the Court stating that the logic behind a definite assignment is to avoid extending the probationary term in the original position the applicant was appointed to beyond 26 weeks.

In plaintiff's instant case, he was compelled to work three months beyond his probationary period in duties as a cashier.

Therefore, on that fact alone, according to Waterman v Miller, plaintiff should be reinstated to Associate Parks Service Worker.

In Federal Rules Digest, cumulative, Supplement 56F 21, denying judgement under the captioned District Court's affidavit and documents filed by defendants in support of their motion to dismiss, could not be considered

where plaintiff had been denied any discovery that would have permitted him to attempt to impeach that information.

Miller v Alexander, 25 FR 2d 1040, DC, 1977, the defendants have submitted an undocumented affidavit of Mr. Carney, a subordinate of the defendant Davis, who became chief of administrative services for Staten Island eight months after plaintiff received his termination.

Plaintiff respectfully requests that based on the Miller decision, his motion now before the Court for interrogatories be granted, in order that plaintiff be permitted to attempt to impeach Mr. Carnye's information.

Your Honor, in conclusion, according to Polanski v Montgomery, 71 NYS 2d 386, where there are conflicting allegations as to the good faith of the appointing in discharging a civil service employee, at the end of his probationary period,

an issue of fact is raised requiring a jury trial.

Plaintiff also has a motion to uphold the defendant to answer that plaintiff would be required to work to complete the probationary period.

In addition, I have another motion --

THE COURT: Are you finished reading?

MR. FRANK: Yes.

THE COURT: Do you wish to say something else?

MR. FRANK: I have two motions for interrogatories.

One of those motions, I believe, the papers were served on March 14th.

The answer was due yesterday.

THE COURT: Let me hear from Corporation Counsel.

MS. HIRSHLEIFER: Basically, I think I will rest with the papers that

that I have submitted to the Court.

As to the motion for summary judgement, although I would like to add two small points --

THE COURT: Surely.

MS. HIRSHLEIFER: (Continuing)

-- which were not addressed in my affidavit in reply.

The first, I guess being that plaintiff in his papers raises the allegation, which was never previously raised, as to being demoted in bad faith and he raises some type of allegation which suggests some type of religious discrimination.

I just wanted to point out in neither of those allegations, does he properly state any type of claim under Section 1983,85 or 86.

With respect to the motion to compel, I submitted an affidavit to the Court which puts my position on the record, with respect to answering that

one question.

With respect to the interrogatories, they were received by mail. We did not receive them until March 16th, so, technically, we have until tomorrow to comply.

MR. FRANK: Those interrogatories were served by me, personally, on the Corporation Counsel.

I never mailed them in.

If they were late getting down to her from the desk where you serve the papers, it is not my fault.

MS. HIRSHLEIFER: There stamped the 16th.

When Mr. Frank suggested that he served them on the 14th, I assumed that he served them by mail.

THE COURT: They are stamped the 16th.

MS. HIRSHLEIFER: Yes.

MR. FRANK: They are due in 30 days; is that correct?

Thirty days from the 16th, would be the 15th.

THE COURT: Anything additional on your motion before the Court?

MS. HIRSHLEIFER: No your Honor.

MR. FRANK: May I say one thing?

I also have a motion --

THE COURT: What I am going to do --

MR. FRANK: They never gave me a motion.

THE COURT: (Continuing)

-- I will address the City's motion, which is before the Court his morning.

I'm going to put it on the record, so you may sit down.

(Cont. next page)

"Robert Frank, a pro se plaintiff, brought the instant action under 42 U.S.C. §§ 1983, 1985, and 1986,

asserting that three New York City employees conspired to deprive him of his civil rights. Specifically, Mr. Frank contends that his demotion from Associate Park Service Worker to Park Service Worker violated his right to due process.

The defendants move this morning for summary judgment dismissing the complaint, alleging that Mr. Frank, as a matter of law, is not entitled to relief.

Rule 56 of the Federal Rules of Civil Procedure permits a Court to grant summary judgement when no questions of material fact exist and the moving party is entitled to judgement as a matter of law.

Futhermore, the burden is on the moving party to show that there is no genuine factural dispute and any doubt as to the existence of such dispute is to

be resolved against it.

Finally, all facts and inferences must be construed in a light most favorable to the non-moving party.

I am cognizant of Mr. Frank's pro se status and have made a special effort to construe all facts and pleadings so as to afford him an opportunity to obtain relief in this action.

I have considered all papers submitted including Mr. Frank's sur-reply. Unfortunately, I find that there is no way for him to prove a set of facts which would so entitled him.

The undisputed facts are as follows:

Robert A. Frank is a tenured Park Service Worker employed by the City Department of Parks and Recreation.

On June 7, 1980, he began a one year probationary period at the title of Associate Park Service Worker. On June 11, 1981, he was notified that he was being denied tenure as an Associate Park

Service Worker. Finally, documentary evidence clearly establishes, contrary to Mr. Frank's assertions, that he took leave days with no pay on September 2 and 10 and February 6, 1981 and at least 4 full and 2 half days in compensatory time. This calculation does not include Saturday, October 18, 1980, over which there is a dispute. These constitute the material facts upon which the case is based.

I turn now to the legal principles which apply in this situation. It is settled that during a probationary term, an employee may be demoted or discharged without a due process hearing. However, once a worker has obtained permanent status, that is, once his probationary period ends, he may not be demoted or discharged without a due process hearing.

Stated differently, when an employee sucessfully completes his probationary term, he obtains a constitutionally protected property interest in his job which may not be

taken from him without due process.

The key question in this motion then, is whether Mr. Frank had acquired this right prior to his summary demotion. If he did, he was entitled to a hearing before demotion; if not, his case fails. I find, as a matter of law, that he did not.

Mr. Frank maintains that his probationary period extended for one calendar year only; that is, from June 7, 1980 to June 6, 1981.

Thus, he claims the June 11, 1981, notification of demotion was not timely as he was already tenured on that date. He further argues that 185 hours in additional overtime worked during the year's probation is counted toward the year of service to speed up the expiration of the probationary term. This is not so.

Section 63 (2) of the New York Civil Service Law provides that Municipal Civil Service Commission shall, and I quote, "provide by rule for the conditions and extent of probationary service."

Pursuant to that mandate, the City Personnel Director has issued Personnel Policy and Procedure Number 615-77a.

615-77a sets forth the terms and conditions of probationary periods for employees of the Parks Department. Points A.4 and .5 categorically state that the probationary period is extended by the number of days of absence without pay and the number of days taken as compensatory time.

However, Mr. Frank argues that in any week in which at least 40 hours were worked while some of this time was taken, the hours worked served to cancel out the time off. This is not so.

The clear words of 615-77a state that the probationary period is extended whenever this type of time off is used. It does not matter if 40 hours were worked in a particular week when time off was taken. The extension is clearly based on the nature of the time and not on when it was taken.

I note that Mr. Frank also questions the validity of 615-77a, stating that it has been superseded by the New York State Civil Service Rules and Regulations.

However, as § 1.1 of those Rules reveals, they are not applicable to City employees.

Mr. Frank cites a case which holds that the State rules should apply when possible. This does not mean that they superseded valid Rules promulgated by the City.

615-77A does control in this case.

Mr. Frank also contends that the

length of the probationary term must be measured by the number of hours worked, that is, when one has worked the hourly equivilent of 52 forty-hour weeks including overtime, the probationary term ends.

Again, I find plaintiff's characterization of the Rules unpersuasive. It is apparent that the term is to run for one calendar year, not the hourly equivalent thereof.

This method of computation accords with the policy behind probationary terms as enunciated in case law.

No law, rule, or regulation which this Court examined implies in any manner that probationary terms should be measured by hours worked.

I find, as a matter of law, that a probationary term of one year, with allowance for extension pursuant to 615-77a means just that. Its termination cannot be hastened by overtime.

Finally, the Department was not required to tell Mr. Frank that the probationary period had been extended. 615-77a clearly provided for that automatic extension and Mr. Frank was or should have been aware of those provisions.

Moreover, as defendant points out, the extension merely adjusted the term to provide for the full one year of service as required.

In short, I find that the plaintiff's probationary period of one calendar year was legitimately extended by at least 8 days, that is, to June 14, 1981.

Thus, he could have been properly demoted on June 11.

I turn now to the plaintiff's procedural objections. Mr. Frank argues that his demotion is invalid because Commissioner Davis failed to personally inform him of it and

because he did not receive one week's notification prior to termination.

Again, I must state my disagreement.

Plaintiff relies on inapposite cases for the proposition that Commissioner Davis had to personally notify him of his termination. None involves the City Civil Service Rules and Regulations. The applicable City Regulation does not contain a requirement that the Commissioner personally notify the employee of termination - it does not preclude authorized delegation.

In addition, I concur in the defendant's reading of Schneider v Lynde as supportive of the proposition that a proper delegation is effective.

I cannot conceive of a more proper delegation than to the Personnel Director of the Parks Department, Mr. Cancellieri.

Moreover, plaintiff has cited no City Regulation requiring a week's notice to the probationary employee. This requirement is contained in the State Rules and Regulations, not the State Civil Service law. Those rules, as I have said, do not apply to the City. In short, the relevant notice requirements were met and appropriate Rules were followed.

I find that the defendants correctly computed the length of plaintiff's probationary status and further, that they notified him of his demotion in a proper and timely fashion before he acquired tenure.

Defendants complied with all necessary procedures.

Hence, there was no wrongdoing or deprivation of civil rights by the defendants. Mr. Frank has not been wronged by the defendants; his claims

under the civil rights statutes cannot succeed.

Therefore, I need not and will not consider whether Mr. Frank has met the Monell or conspiracy requirements of those statutes.

Because I am granting the defendant's motion, plaintiff's discovery motion is moot and will not be decided.

For the above stated reasons, the defendants' motion for summary judgment is hereby granted. The parties are to Settle an Order on Notice on or before April 30, 1982."

If you wish a copy of the Court's decision, order it from the Court Reporter.

Anything additional?

Thank you.

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UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of January, One Thousand Nine Hundred and Eight-Three.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE,
HON. RALPH K. WINTER,
Circuit Judges

- -

ROBERT A. FRANK,

Plaintiff-Appellant,

v.

ORDER
82-7444

GORDON J. DAVIS, Individually and as Commissioner of Parks and Recreation; ANTHONY CANCELLIERI, Individually and as Director of Personnel, Department of Parks and Recreation; GLEN ANDERSON, Individually and as Administrative Parks and Recreation Manager of Staten Island,

Defendants-Appellees.

- -x

UNITED STATES COURT OF APPEALS
FILED
JAN 28 1983
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

EXHIBIT B

Robert A. Frank, pro se, appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, J.) granting appellees' motion for summary judgment and dismissing appellant's claims under 42 U.S.C. §§ 1983, 1985 an 1986 (1976).

The appellees in this case are Gordon J. Davis, New York City Commissioner of Parks and Recreation, Anthony Cancellieri, Director of Personnel of the Department of Parks and Recreation, and Glen Anderson, Administrative Parks and Recreation Manager of Staten Island. Appellant says that these persons conspired to deprive him of a permanent position as Associate Park Service Worker of the City of New York. The uncontested facts reveal that on June 7, 1980, appellant was promoted from Park Service Worker to Associate Park Service Worker, subject to a one year

probationary period. On June 11, 1981, appellant received a letter notifying him that he was being demoted to his original position. We agree with the district court that appellant was demoted before the expiration of the probationary period. The three days appellant was absent from his job without pay and the eight and a quarter days he took off as compensatory time served to extend his original 52 week probationary period through June 19, 1981. N.Y. Civil Service Law § 63 (1)(McKinney 1973); New York City Personnel Policy and Procedure No. 615-77a (4) and (5) (1979). Before the expiration of his probationary period, State law granted appellant no property interest in his new job cognizable under the fourteenth amendment. Board of Regents v. Roth, 408 U.S. 564 (1972); Bishop v. Wood, 426 U.S. 341 (1976);

N.Y. Civil Service Law § 75 (McKinney 1973 & Supp. 1982); 4 N.Y.C.R.R. § 4.5 (a) (5) (i) (1979). Appellant has, therefore, stated no claim under 42 U.S.C. § 1983. Gomez v. Toledo, 446 U.S. 635 (1980).

We also agree with the district court that appellant's notice of termination complied with applicable state and city law. Personnel Policy and Procedure No. 615-77a (4) and (5), promulgated pursuant to N.Y. Civil Service Law § 63 (McKinney 1973), measures the probationary period not by the hour, as appellant would have it, but by the calendar. Futhermore, it requires neither notice of the automatic extensions invoked in this case nor notice four weeks in advance prior to termination. Only written notice of termination before the expiration of the probationary period is called for, and appellant received such

notice a week before his probationary period ended.

The judgment is affirmed.

(signed)

HON. Ellsworth A. Van Graafeiland

(signed)

HON. Lawrence W. Pierce

(signed)

HON. Ralph K. Winter